

# Tort Notes For Finals

## Intentional Torts

*Intentional torts exist to protect an individual's persons or property rights from unwanted interference by others.*

They include:

- Trespass torts
- Detinue
- Conversion

They are referred as intentional because they are the type of torts performed intentionally in the sense that they were deliberate transgression of another person.

### **Elements common to all Trespass Torts must include:**

- A positive voluntary act – it was intentionally and consciously performed
- Which DIRECTLY
- Interferes with the plaintiff( person, land or goods)
- Is actionable PER SE. Damage is not an element to trespass

*A positive voluntary Act is when an intentional deliberate act or a negligent act directly causes interference with another person, land or goods; a wilful act.*

### **Three intentional torts protect distinct aspects of an individual's person:**

- The tort of battery – protects the body
- The tort of assault – protects mental well being
- The tort of false imprisonment – protects liberty

## Trespass to Person

### **Battery**

**To prove battery, each element of the tort must be made out. The element of this tort may be outlined as follows:**

- An intentional voluntary act by a person – intend the act not the injury
- Which directly
- Causes contact with the body of another

The act must take place without lawful justification and without the consent of the plaintiff. The existence of consent or lawful justification will operate as a defence to the action.

Burden of proof

- **Trespass:** a plaintiff must prove the facts of the direct interference, the burden then shifts to the defendant to show either a lack of intention, or that the act was not involuntary.
- **Prima Facie:** a trespass is unlawful and the onus of proof lies upon the defendant to establish on the balance of probabilities a defence by way of excuse, authorisation or justification.
- **Case:** a burden wholly on the plaintiff

**Platt v Nutt (1988):** the plaintiff must prove on the balance of probabilities that the injuries were the direct result of the act or force of the defendant.

**Direct intentional act** – these elements are common to intentional torts of trespass

**Contact with the body** – concept of physical contact is varied

*There must be an inference – physical contact – with the plaintiff's body*

- **Spitting in someone's face**, an unwelcome kiss or hitting a person with a missile or object (*R v Cotesworth [1704]*)
- **Taking the plaintiff's hand** (*Fisher v Carousel Motor Hotel Inc (1967)*).
- **Throwing boiled water** – there was no need for any contact with the body other than the water. (*Pursell v Horn 1838*)
- **Cutting someone's hair without consent** (*Forde v Skinner*)
- **Removing a chair from a person sitting on it** (*Hopper v Reeve*)

*A battery must be a positive and affirmative act which introduces some form of contact that is offensive to the plaintiff.*

- The concept of unwanted touching was historically referred to as touching 'in anger'.
- Holt CJ stated in **Cole v Turner [1704]:**  
*To touch another in anger, though in the slightest degree or under pretence of passing, is, in law, a battery. First... the least touching of another in anger is a battery. Secondly, if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery.*
- In anger means simply engaging in prohibited conduct or whether it refers to hostility being a necessary part of battery.

*This inference was a direct & positive act and not consequential*

### **Directness**

A consequence of act must be immediate and inevitable – **Hutchins v Maughan** (Dogs eating poison baits); *Southport v Esso*

- Not voluntary or immediate – *where the injury is immediate, an action of trespass is available, where it is only consequential, it must be an action on the case – (Hutchins v Maughan)*

### Positive Act

The act must be a positive act with the application towards the plaintiff.

- **Obstruction** – not enough to cause battery (Campbell v Samuels)
- **Cannot be a reflex or omission** (Stokes v Carlson)
- **Course of ordinary life** – direct positive, physical contact will not amount to battery when it has occurred in the course of everyday life. (RE: F Mental Patient: Sterilisation)
  - Jostling in a street or some other crowded place, social contact, at parties and such like is an example of exigency of everyday life'
  - Affirmed by High Court in Department of Health and Community Services v JWB (1992)

### Hostile Act

Hostility means unwanted contact – but it is not an element of battery. Physical Contact must be outside of everyday contact. Hostility may or may not be required, but it needs to be perceived by the plaintiff.

- Wilson v Pringle (1987) – the court states that the requisite hostility need not amount to ill will or malevolence. Rather the required element of hostility will be satisfied where the defendant's intention is to interfere with the plaintiff in contravention of her rights.
- Collins v Wilcock (1984) – a woman was touched unwantedly on the shoulder by a police officer. It was held that the police officer committed battery when she took the arm of the woman to restrain her, without intending to arrest her. The court held that the officer had gone beyond the scope of her duty in detaining the woman.
- Rixon v Star City Casino (2001) – tapping a person on the shoulder is within everyday life and is not deemed hostile. The court held that '*the absence of anger or hostile attitude by the person touching another is not a satisfactory basis for concluding that the touch was not a battery*'. It was held that there was no battery as physical contact was within the scope of everyday life.

### Consequential Act

Where the act is consequential, then it is not direct

- Hutchins v Maughan – *if you throw a log on the highway and it hits a person, then the act is direct. If you throw a log on the highway and it doesn't hit someone, but later someone trips over it – then there is no claim as it is not direct*
- Consequential – if there are other acts necessary for the interference to occur, then it is not direct.

*The act of inference was voluntary and intentional or voluntary or negligent.*

**Act must be intentional or negligent**

- **Not intentional** – if the act was not intentional, it must be negligent to amount to a battery.

- **Williams v Milotin** – Truck Driver seriously injured a cyclist – was not intentional – High Court held that it negligent driving and battery
- **Not negligent** – if the act is not negligent, then the act must have been deliberate and wilful – the defendant meant to do it.
- **McNamara v Duncan** – plaintiff received punch in the head when playing football. Argued as not intentional – it was held that the defendant did not intend the consequences, act was intentional
- **Consequence irrelevant** – it does not matter that the defendant did not intend the consequences of their act, only that the act was intended. – refer to the MacNamara v Duncan Case.

## Assault

*An assault is any direct threat by a person which intentionally or negligently creates in another an apprehension of imminent, harmful or offensive contact.*

### Elements of Assault – tort of assault

To prove assault, each element of the tort must be made out. These elements are:

- An intentional voluntary act or threat by the defendant
- Which directly creates in another person (the plaintiff)
- A reasonable apprehension of imminent contact with that person's body.

The act must take place without lawful justification and without the consent of the plaintiff.

- Plaintiff bears the onus of establishing on the balance of probabilities the first two requirements below.
- Defendant bears the onus of providing that they themselves lack the requisite state of mind.

### **Apprehension – act or threat**

*The conduct required to constitute an assault may be threatening acts, words or both.*

There must be an apprehension of immediate physical contact with the body of the plaintiff – must have an apprehension of physical contact by the defendant

- **Direct link** – there must be a direct link between the threat of the tortfeasor and the plaintiff and the plaintiff no longer feeling secure
- **Mere words** – are typically not enough (*Thomas v National Union of Mineworkers*) **BUT CAN BE if repeatedly threaten and abuse** (*Barton v Armstrong*)
- **Lawful force** – if force is permitted by law then not assault (*Read v Coker, Police v Greaves*)
- **Conditional threat** – a conditional threat can still be assault but you have to completely neutralise the threat – (*Roza v Samuels*) – otherwise (*Tuberville v Savage*) – *if it were not assize-time I would take such language from you*

## **Intention**

This element is common to all intentional torts of trespass to the person.

**Rixon v Star City Pty Ltd (2001) NSWCA 265** – concerned a legal action for assault

- This case was applied recently in the a Queensland Supreme Court Case – **Cranston v Consolidated Meat Group Pty Ltd (2008)**.
- *Proof of an assault requires proof of an intention to create in another person an apprehension of imminent harmful or offensive conduct. If the assault lies in creating an apprehension, proof of assault does not require proof of an intention to follow it up or carry it through*– passage from Rixon Case

## **Cranston v Consolidated Meat Group Pty Ltd (2008)**

- This case involved the plaintiff who was an employee of the Meat Group argued with a fellow employee Mr Mohammed. An argument arose when Mohammed believed the Ms Cranston was not providing the assistance to which he was entitled on the 'blade table' where he was working. Afterwards, he told her to fuck off, and as he did, he gestured back in the direction of Ms Cranston with his knife.
- The court found that Mohammed did not point the knife at Cranston and did not wave the knife at her in a threatening manner and that the knife was never dangerously close to Ms Cranston
- Court held in the Cranston CASE that 'insofar as any use was made of the knife, I am not satisfied that there was any intention on the part of Mr Mohammed to create any apprehension of imminent or harmful contact.
- The use of the knife was unconscious and resulted solely from the fact that Mr Mohammed was holding the knife in the course of his work when indicated where he wanted Ms Cranston to go. Therefore there was no assault.

## **Reasonable apprehension – intentional or negligent act**

- **Not intentional – if the act is not intentional, it must be negligent t amount to an assault**
  - **Williams v Milotin** – Truck driver seriously injured a cyclist wasn't intentional
  - High court held that it was negligent
- **Not negligent – if the act is not negligent, then the act must have been deliberate and wilful – the defendant meant to do it**
  - **MacNamara v Duncan** – plaintiff received a punch in the head when playing football. Argued as not intentional
  - It was ruled as irrelevant that the defendant did not intend the consequences, act was intentional

## **Imminence/Reasonable Fear**

*If the plaintiff is at the mercy of the defendant and has no idea that the harm will occur now or later on, then it is a continuous fear and enough for assault.*

- **Zanker v Vartzokas (1962)** – plaintiff received a car lift from the defendant, who asked her for sexual favours. She asked to be let out of the car but he sped up, saying ‘I am going to take you to my mate’s house, he will really fix you up’.
- **The court held that – this** threat was imminent even though it was one of future violence, as the violence threatened would occur immediately at the end of her imprisonment in the car
- **White J contended that** – *a present fear of relatively immediate, imminent violence was instilled in her mind from the moment the words were uttered, and that fear was kept alive in her mind, in the continuing present with her as a prisoner, towards the house where she feared sexual violence was to occur.*
- **Barton v Armstrong (1962)** – Taylor J stated that – *if the threat produces fear or apprehension of violence then I am of the opinion that the law is breached, although the victim did not know when that physical violence may be affected.*

### **Conditional threats**

*Not actionable as such, depends on the circumstances. If the conditional threat is made with a clear threat of imminent force, then the assault may stand*

- **Rozsa v Samuels (1969)** – *I will cut you to bits if you try*
- **Tubercle v Savage (1669)** – *if it wasn’t for the day where the judges were in town, I would not an assault because he was not going to do it.*
- **The act not the consequence** – the act must be intentional and voluntary – the consequences for the assault are irrelevant – only that the defendant intended to do the act that caused the apprehension (**Rixon v Star City**)
- **Thomas v National Union for Mineworkers** – Mineworkers were on strike. Some miners still worked and were abused.
- The capacity in question is present at the time the overt act is committed. Miners who worked were protected by the police. Not assault as no reasonable fear of violence.

### **The act of interference was voluntary and intentional, voluntary and negligent**

- **Only need to anticipate apprehension** – defendants act must create an apprehension of immediate physical contact in the plaintiff, they need only anticipate the contact and not fear it.
- **Reasonable apprehension** – the apprehension must be a reasonable apprehension (**Barton v Armstrong**)
  - The test of Reasonable apprehension – the test is an objective one

- It does not matter that the plaintiff did not fear the defendant's act, only that they reasonably apprehended immediate bodily contact
- Exception – when a defendant knowingly takes advantage of fear of an exceptionally timid plaintiff. In this instance, reasonableness towards fear is irrelevant.
- **Knowledge of the act** – the plaintiff must have knowledge of the defendant's act.
  - Unconscious or unaware person – silently waiving a first in an aggressive manner behind someone's back to assaulting them in their sleep is not enough (**R v Phillips**)

## False Imprisonment

*False imprisonment is the total deprivation of freedom or movement without lawful justification.*

False imprisonment is tort against person when their personal liberty has been unlawfully restrained. This tort can also be accompanied by the tort of assault or battery.

### Elements of false imprisonment:

1. A positive voluntary act of the defendant
2. Directly causing
3. The total deprivation of the liberty of the plaintiff

The act must take place without lawful justification and without the consent of the plaintiff.

- Plaintiff bears the onus of establishing on the balance of probabilities the first two requirements below.
- Defendant bears the onus of proving that the requisite state of mind was lacking.

### Positive voluntary act of the defendant

The defendant's act must be positive to the plaintiff for false imprisonment to occur.

- **Cowell v Corrective Services Commission** – a prisoner had been held in prison for longer than his sentences allow. Was false imprisonment as the omission was poor enough.
- **Symes v Mahon** – Plaintiff was detained mistaken by police officer. Was falsely imprisoned as there was a complete submission based on no evidence.

### Words can amount to a positive act:

- **Complete submission** – by the plaintiff by control of the Defendant. More so when plaintiff's words are a threat – Symes v Mahon
- **Embarrassment** – failure to submit which subsequently causes embarrassment – Con v David Spencer
- **Future Acts** – take back to my place and give it to you – Burton v Davies

### Total deprivation of liberty

*False imprisonment requires a total deprivation of liberty.*

Imprisonment does not mean being falsely incarcerated in a correctional centre. A prison need not have walls.

**Mere partial obstruction – Bird v Jones (1845):**

- Plaintiff was prevented for half an hour from going forwards along a path by two policemen who were positioned by the defendant.
- The court held that it was not false imprisonment as it was not total restraint
- The plaintiff could have gone in another direction to avoid it.

**Without reasonable means of escape**

If chance of injury, then it can be false imprisonment – if the plaintiff can escape but would be injured in the process, the plaintiff is in false imprisonment

- Burton v Davies (1953) – truck driver promised to take woman home. Drove past her house. False imprisonment as she could have jumped from the truck, but would have been injured
- Zanker v Vartzokas (1988) – driving too fast for the plaintiff to escape, unwilling passengers were held to be unlawfully imprisoned when the only means of escape was to jump from the defendant's moving vehicle.
- Balmain New Ferry v Roberston (1906) – man entered wharf by own free will, and wanted to leave. Required to pay to leave. This was not false imprisonment as his 'contractual obligation' to pay overrides his freedom. Reasonable means of escape can be quite broad – could jump in the water

**Plaintiff doesn't know**

If the plaintiff is unaware of false imprisonment then only less damages can be awarded once they are made aware

- Murray v Ministry of Defence 1988 – if plaintiff is drunk, asleep or a child and is imprisoned can be still amount to false imprisonment
- Meering v Graham White Aviation (1919) – the plaintiff suspected for theft was asked to accompany two aviation officers to the defendant's office, where he was kept under guard. At the time, the plaintiff was unaware that there were detectives outside the room to prevent him from leaving. It was held that the defendant's company was liable for false imprisonment.
- Myers Stores Ltd v Soo (1991) – mistaken for a shoplifter. Plaintiff was accompanied to an office for questioning – subject to someone's control can be false imprisonment. Nominal damages may be awarded where the plaintiff did not know of false imprisonment.

**For any period of time**

Any form of deprivation of liberty is sufficient, regardless of the amount of time.

- Murray v Ministry of Defence (1988) – the plaintiff detained in her own home for 30 minutes – the short duration of time was irrelevant, it is the removal of liberty that should remain actionable.



- Although the short duration of deprivation of liberty may be relevant for the determination of damages.

### **The defendant had the requisite state of mind**

Act must be intentional or negligent ( but doesn't have to coincide)

- **Not intentional** – if the fact is not intentional, it must be negligent to amount to an false imprisonment.
- **Williams v Milotin** – truck driver seriously injured a cyclist – was not intentional. Court held it to be negligent.
- **Not negligent** – if the act is not negligent, then the act must have been deliberate and wilful – the defendant meant to do it
- **MacNamara v Duncan** – Plaintiff received a punch in the head when playing football. Argued as not intentional. – court held that it was intentional.

### **Act and intention does not have to coincide**

**Cowell case** supports this view that where a prisoner is held for a term and unlawfully held longer than that term – then act and intention need not coincide

- If B consents, and proceed to be locked in a room by A, but then later revokes consent, but A refuses to unlock them, imprisoning B there has been false imprisonment despite the fact that the act (locking the door) and the imprisonment (refusing to unlock the door) don't coincide.

### **May be psychological false imprisonment**

The coercion of false imprisonment need not be physical. It may be psychological where the defendant intends to detain the plaintiff or recklessly give the plaintiff the impression and belief that they are being detained is reasonable in some circumstances.

- **Symes v Mahon (1922)** – plaintiff was accompanied by police officer who arrested and charged him for not supporting an illegitimate child. It was held that the plaintiff had no means of escape which could reasonably be taken from him.
- **Watson v Marshall (1971)** – the defendant a police officer, asked the plaintiff to accompany him to the hospital. Plaintiff believed that he would be forced to go if he refused. This psychological restraint imposed upon him amounted to an imprisonment of him by the defendant.

### **Directness of Restraint**

- **Dickinson v Waters** – Policeman arrested woman for stealing celery stick on instruction from a store manager. Dodgy – as store owner ordered policeman and he should be liable.
- **Myers v Soo** – without legal authority – intentionally imposed restraint on P without legal authority when two officers and store detectives imprisoned P.

No defence available to defendant – defence must be proved by the plaintiff – Marion's case

## Trespass to Land

*Trespass to land is a voluntary, intentional (negligent) direct physical interference with the plaintiff's exclusive possession of land.*

Trespass to land is actionable per se, meaning it can be proven without proof of damage.

### **CASE: Dumont v Miller [1873]**

- The defendant with his beagles entered upon the plaintiff's property for the purpose of hunting.
- The defendant was successfully sued for trespass despite there being no damage to the plaintiff's property.
- There is no need for damage to be proven as the tort is the physical intrusion.

### **The elements for the tort of trespass to land includes:**

- The intentional or negligent act of the Defendant
- Which directly interferes
- With the plaintiff's exclusive possession of land – a positive voluntary act which causes direct interference with a person's use and enjoyment of the land

### **However, D's act must be voluntary:**

- **Smith v Stone (1647)**
- **Public Transport Commission of NSW v Perry (1977)**

### **Exclusive possession of the land**

The plaintiff does not have to have a legal ownership, merely it possession of the land at the time that the tort occurred. The plaintiffs does not need to be the title holder, but must have exclusive possession.

### **Standing to sue**

- An owner of land who is not in possession will be able to sue in trespass, yet a plaintiff who has not title but who has exclusive possession (the tenant can)
- A tenant may also sue the owner of the land in trespass. (*Rodrigues v Futon 1894*)
- Standing to sue, tort law protects possession not ownership
- In order to maintain an action in trespass to land, the plaintiff must establish exclusive possession of the land the subject of the claim.

### **Newington v Windeyer (1985)**

- The plaintiffs were the owners of several properties which fronted an area of land known as the grove. The plaintiff used the grove for recreation and treated it as their own. There was no registered owner of this property. When the defendant, who owned two houses which backed onto the property, started to use the land, the plaintiffs objected and sued in trespass.